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COMMENT

The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives

The Next Justice: Repairing the Supreme Court Appointments Process
BY CHRISTOPHER L. EISGRUBER
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What distinguishes judicial liberals from judicial conservatives? The answer, argues Christopher Eisgruber in *The Next Justice: Repairing the Supreme Court Appointments Process*, is the same as what distinguishes liberals from conservatives generally: their "political and moral values."[1] According to Eisgruber, a self-described liberal,[2] the line dividing liberals and conservatives is especially evident on the Supreme Court. Because the Court's docket "consists almost exclusively of hard cases where the law's meaning is genuinely in doubt," applying the law "will require the justices to make politically controversial judgments" "in a significant number of instances."[3] "When they make those judgments," writes Eisgruber, "they have no choice but to bring their values to bear on the issues in front of them."[4] Eisgruber thus argues that Senators should thoroughly examine a Supreme Court nominee's ideological convictions before voting to confirm the next Justice.[5]

1. CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 9 (2007); *see also id.* at 18 (accepting the "[c]onventional wisdom . . . that Supreme Court justices vote along ideological lines").
2. *Id.* at 29.
3. *Id.* at 28.
4. *Id.* at xi.
5. *See infra* text accompanying notes 23-30.

Ask judicial liberals what distinguishes them from judicial conservatives, and they will likely agree that the difference is largely ideological.[6] Ask judicial *conservatives* what distinguishes them from judicial liberals, and they will likely disagree—vehemently. In their eyes, the difference is mainly methodological: while conservatives maintain that cases should be decided solely on the basis of neutral legal principles,[7] liberals deny that law and politics can (or should) always be kept separate.

Throughout his book, Eisgruber dismisses conservatives' emphasis on methodology as misguided and misleading.[8] But once the perspectives of both judicial liberals and judicial conservatives are taken seriously, the real divide between the two sides begins to emerge: what truly distinguishes judicial liberals from judicial conservatives is their views of the relative number of hard cases the Supreme Court hears. Whereas judicial conservatives believe that there are extremely few hard cases—cases in which traditional legal authorities fail to yield a single right answer, leaving a gap to be filled by moral reasoning[9]—judicial liberals believe that there are very many. The sooner both sides realize this, the sooner they can stop talking past each other—and the sooner the Supreme Court appointments process can be repaired.

I. EISGRUBER'S NEXT JUSTICE: NEITHER UMPIRE NOR IDEOLOGUE

Eisgruber begins *The Next Justice* with an examination of the judicial role. "To decide what kinds of justices we want, and how to get them," Eisgruber explains, "we first need to understand exactly what justices do."[10]

One view, embraced by judicial conservatives and articulated by John Roberts at his confirmation hearing,[11] "regards Supreme Court justices as neutral umpires who never invoke anything other than their apolitical, technical expertise about legal rules."[12] Dismissing this view as naive, Eisgruber

6. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996); LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 144 (2005); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 147 (2006).

7. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 2 (1990); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

8. *See infra* text accompanying notes 11-16.

9. H.L.A. HART, THE CONCEPT OF LAW 272 (2d ed. 1994).

10. EISGRUBER, *supra* note 1, at 6.

11. *See id.* at 6-7, 17; sources cited *infra* note 36.

12. EISGRUBER, *supra* note 1, at 6.

contends that "Justices cannot be mere umpires" because, "[u]nlike the rules of baseball, [the Constitution] speaks in abstract phrases, and nobody can interpret those phrases without making politically controversial judgments."[13] Not even originalists can avoid making such judgments, he claims, because "the framers' intentions are no less ambiguous than the constitutional text itself."[14] According to Eisgruber, Justices necessarily rely on their "ideological values"—"political and moral values of the sort that distinguish liberals from conservatives"—when interpreting the Constitution.[15] Judicial conservatives who suggest otherwise, Eisgruber asserts, are simply being disingenuous: given that "originalist accounts of constitutional meanings" merely "reflect the ideological values of the judges who render them," "[i]t is hard to believe that the analysis is being driven by a disinterested analysis of historical intentions, rather than by the judges' values."[16]

Another view, identified with Senator Charles Schumer,[17] regards Justices "as ideologues who decide cases on the basis of a political agenda."[18] Eisgruber rejects this account as too cynical: "Although justices must make politically controversial judgments, their decision making differs sharply from that of legislators and other officeholders."[19] For one thing, he argues, "justices share a strong commitment to impartiality," which "prohibits them from favoring certain persons, groups, constituencies, or causes over others."[20] For another, he claims, Justices share a deep commitment to certain "procedural values"—"values that pertain to the jurisdiction, responsibility, or operation of institutions, including courts."[21] According to Eisgruber, these commitments allow Justices to transcend "traditional ideological cleavages" and "reach unanimous decisions in politically charged cases."[22]

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13. *Id.* at 8. Eisgruber argues that the Constitution is not unique in this respect: "Like the Constitution, statutes and common law precedents often include abstract phrases or ambiguities that judges cannot interpret without making contestable judgments." *Id.* at 27.

14. *Id.* at 35.

15. *Id.* at 9; *see also id.* at 19-25; *id.* at 22 (arguing that "[m]ost constitutional language" cannot be interpreted without invoking ideological values).

16. *Id.* at 40.

17. *See id.* at 7-8.

18. *Id.* at 6.

19. *Id.* at 8.

20. *Id.* at 8-9.

21. *Id.* at 9.

22. *Id.* at 79.

Having concluded that Justices are "neither umpires nor ideologues,"[23] Eisgruber argues that their role is best understood in terms of the ideological and procedural values they enforce.[24] He thus urges Senators to evaluate nominees on the basis of their values[25] instead of their "methodological positions about, for example, how much weight to give to precedent, or whether to respect the framers' intentions."[26] With procedural values cutting across political lines,[27] Eisgruber assumes that the difference between Democratic nominees and Republican nominees will be ideological, as he claims it has always been.[28] He recognizes, however, that Senators "cannot simply insist on nominees who share their own views."[29] He therefore concludes that, while Senators should reserve the right to reject nominees who seem "ideologically rigid or extreme," "[t]hey should permit presidents to appoint well-qualified moderates from the president's own party."[30]

II. THE REAL DIVIDE BETWEEN LIBERALS AND CONSERVATIVES

The central flaw of *The Next Justice* is its failure to understand judicial conservatives as they understand themselves. By making nearly no effort to identify with judicial conservatives, Eisgruber undermines one of his book's primary purposes: finding a way "to replace the empty political theater of recent confirmation battles with more substantive deliberation."[31] For until liberals and conservatives find a common language in which to discuss the law—until they find a way to talk with, rather than past, each other—substantive deliberation about Supreme Court nominees will be virtually impossible.

Can liberal and conservative notions of the law be placed within a single framework? Or will judicial liberals continue to regard judicial conservatives as naive and disingenuous for denying that a nominee's values matter, and judicial conservatives continue to regard judicial liberals as lawless and result-oriented for believing that they do?

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23. *Id.* at 8.
24. *Id.* at 9-10, 99.
25. *Id.* at 10-11, 188-89.
26. *Id.* at 99.
27. *Id.* at 80.
28. *Id.* at 124-25.
29. *Id.* at 150.
30. *Id.* at 151.
31. *Id.* at 14-15.

Without realizing it, Eisgruber himself hints at a way of reconciling liberal notions of the law with conservative ones. Throughout *The Next Justice*, Eisgruber describes cases before the Supreme Court as "hard" or "difficult," using the words loosely, in their everyday sense.[32] In the literature on analytical jurisprudence, however, the term "hard cases" has a specific, technical meaning: "hard cases" are "legally unregulated cases in which on some point no decision either way is dictated by the law and the law is accordingly partly indeterminate or incomplete."[33] Where the law has run out, the judge must resort to moral reasoning to fill in the gap.[34] With this definition of "hard cases" in mind,[35] we can begin to discern the real divide between judicial liberals and judicial conservatives: the two sides fundamentally disagree about the relative number of hard cases the Supreme Court hears.

Judicial conservatives believe that traditional legal authorities—text, history, and structure—rarely run out; the law almost always yields a single right answer. The belief that there are extremely few hard cases, which require moral reasoning, explains why judicial conservatives often compare themselves to neutral umpires.[36] It also explains why they frequently emphasize judicial

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32. *See, e.g.*, *id.* at x, 6, 28, 89, 137.

33. HART, *supra* note 9, at 272; *see also* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 182 (1979) (defining "[u]nregulated disputes" as ones in which "the law contains a gap" and thus "fails to provide a solution").

34. *See* HART, *supra* note 9, at 275; *see also* RAZ, *supra* note 33, at 199 ("[I]n their law-making judges do rely and should rely on their own moral judgment."). Legal philosophers disagree about the status of moral reasoning. Legal positivists argue that moral reasoning occurs outside "the law," as part of making it; Ronald Dworkin argues that moral reasoning occurs within "the law," as part of interpreting it. *See* HART, *supra* note 9, at 272. This Comment speaks in the language of legal positivism for purposes of clarity; it does not take a position in this broader jurisprudential debate.

35. Note how strict this definition is. A "hard case" is not merely one in which finding the right legal answer is difficult or challenging; so long as a single right answer can be found, the case is not a "hard" one. Nor is a "hard case" merely one in which the law's meaning is disputed or contested. Although reasonable disagreement about what the law means may be a sign that the law has run out, it is not dispositive. Note, too, that a "hard case" is not necessarily one in which the law does no work at all, but instead may be one in which the law goes a long way before running out. The size of the gap left to be filled by moral reasoning thus varies from case to case, depending on how determinate the legal materials are. So long as the law runs out before providing a single right answer, however, the case is a "hard" one.

36. *See, e.g.*, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) [hereinafter *Confirmation Hearing*] (statement of John G. Roberts, Jr.) ("Umpires don't make the rules, they apply them . . . . I will remember that it's my job to call balls and strikes, and not to pitch or bat."); BORK, *supra* note 7, at 273 (comparing litigators to pitchers and judges to umpires).

restraint; when the law actually runs out, judicial conservatives would rather defer to the choices of others than engage in moral reasoning themselves.[37] Because they perceive so few cases in which moral reasoning is necessary, judicial conservatives regard judicial liberals as lawless and result-oriented for making such reasoning central to their methodology.[38]

In contrast, Eisgruber and other judicial liberals believe that the Supreme Court's docket is filled almost entirely with hard cases.[39] Consistent with this view, Eisgruber downplays the power of legal reasoning throughout his book. Technical legal skills alone cannot resolve disputes before the Court,[40] he claims, because such skills can do little more than "identify what issues are posed."[41] Historical sources cannot provide determinate answers to constitutional questions, he contends, because such sources are, "if anything, more ambiguous" than the language of the Constitution itself.[42] Believing that the law nearly always runs out in cases reaching the Court, judicial liberals assert that a nominee's values are relevant whether we like it or not: "Justices make politically controversial judgments not because of a lust for power, but because the law and their judicial responsibilities compel them to do so."[43]

To be sure, not all judicial liberals consider a Justice's *own* values a legitimate source of authority. Justice Stephen Breyer, for example, explicitly

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37. *See, e.g.*, Michael W. McConnell, Active Liberty*: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2414 (2006) (book review) ("If textual and historical sources are indeterminate, as they often are, judges are not free to resolve the ambiguity in favor of their own preferences, but must defer to the decisions of the legislature."). Of course, the decision to defer in a hard case is itself a moral one.

38. *See, e.g.*, BORK, *supra* note 7; SCALIA, *supra* note 7.

39. *See, e.g.*, Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 851 ("[T]he Court considers so many 'very hard' cases in which a Justice's ideology may be influential in decisionmaking."). Eisgruber does write that "[t]he Supreme Court's docket . . . consists almost exclusively of hard cases." EISGRUBER, *supra* note 1, at 28. By "hard cases," however, Eisgruber means "cases where the law's meaning is genuinely in doubt"—that is, cases where the law's meaning is something "about which reasonable judges not only could disagree but have in fact disagreed." *Id.* Because Eisgruber is not using the term "hard cases" in its technical sense, *see supra* note 35, this Comment relies on other statements to show that Eisgruber perceives a large number of "hard cases," strictly defined.

40. EISGRUBER, *supra* note 1, at 130.

41. *Id.* at 137.

42. *Id.* at 35.

43. *Id.* at x-xi; *see also* DWORKIN, *supra* note 6, at 3 (arguing that judges have "no real option but to" make "fresh moral judgments" when applying the Constitution to "concrete cases").

denies that Justices should impose their personal convictions from the bench.[44] Advocating "a form of judicial restraint,"[45] he argues that the values Justices invoke should be limited to those consistent with the Constitution's basic purpose, such as "active liberty."[46] But even an approach like Justice Breyer's presupposes the existence of hard cases—cases in which, as Justice Breyer puts it, "language and structure, history and tradition . . . fail to provide objective guidance."[47] And even an approach like Justice Breyer's entails moral reasoning in such cases, for Justices exercise moral reasoning whenever they rely on *any* moral principle, regardless of whether that principle is derived from their own values, "the evolving standards of decency that mark the progress of a maturing society,"[48] or, in the case of active liberty, the "nature" of the Constitution itself.[49] It thus matters not that Justice Breyer and other judicial liberals deny a role for personal values in deciding hard cases; so long as they take the frequent existence of such cases for granted in justifying a role for moral reasoning generally, their reputation as judicial liberals is deserved.

III. THE IMPLICATIONS FOR THE SUPREME COURT APPOINTMENTS PROCESS

If the real divide between judicial liberals and judicial conservatives lies in how many hard cases they believe the Supreme Court hears, *The Next Justice* fails to provide a common language in which the two sides can understand each other. To repair the confirmation process, Eisgruber recommends that nominees be evaluated on the basis of their ideological and procedural convictions. But because Eisgruber's proposal speaks only to one side—the side believing that the Court hears very many hard cases—implementing it will be contentious. Three controversial implications of his proposal deserve mention.

First, if a nominee has prior judicial experience, Eisgruber explicitly endorses the use of studies showing "the overall pattern of [the nominee's]

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44. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 18 (2005).

45. *Id.* at 37.

46. *Id.* at 33.

47. *Id.* at 124; *see also id.* at 17-18 (describing "active liberty" as "fall[ing] within an interpretive tradition" that "does not expect highly general instructions themselves to determine the outcome of difficult concrete cases where language is open-ended and precisely defined purpose is difficult to ascertain"); *id.* at 86-87 (explaining how judges differ in dealing with "truly difficult" cases).

48. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.).

49. BREYER, *supra* note 44, at 5.

decision making" while on the bench.[50] According to Eisgruber, "big picture" trends,[51] such as how often the nominee voted in favor of the government at the expense of civil rights plaintiffs, or in favor of corporations at the expense of environmental groups, help reveal the nominee's ideological and procedural values, which, Eisgruber claims, "[r]arely, if ever, can . . . be discerned from the disposition of a single case."[52]

Second, Eisgruber lends legitimacy to potentially far-reaching investigations into a nominee's private life. Senate Democrats have already begun opposing nominees with "deeply held views,"[53] a phrase some believe to be mere code for conservative religious beliefs.[54] One Republican Senator recently cited a nominee's attendance at a same-sex commitment ceremony as grounds for opposing her confirmation.[55] If Senators should evaluate a nominee's ideological convictions, there seems to be no principled reason why a nominee's religious beliefs or private activities should be off limits.[56]

Third, Eisgruber's arguments seem to suggest that the American Bar Association (ABA) should begin rating nominees on the basis of ideology, at least if its criteria are to be "the gold standard by which judicial candidates are judged."[57] Currently, the ABA "restricts its evaluation to issues bearing on

50. EISGRUBER, *supra* note 1, at 160. For examples of such studies, see THE ALITO OPINIONS: A REPORT OF THE ALITO PROJECT AT YALE LAW SCHOOL (2005), http://www.campusprogress.org/uploads/YLSAlitoProjectFinalReport.pdf; and PUB. CITIZEN LITIG. GROUP, THE JUDICIAL RECORD OF JUDGE ROBERT H. BORK (1987), *reprinted in* 9 CARDOZO L. REV. 297 (1987).

51. EISGRUBER, *supra* note 1, at 159.

52. *Id.* at 159-60.

53. For examples of Senate Democrats using this and similar phrases, see John Cornyn, *Restoring Our Broken Judicial Confirmation Process*, 8 TEX. REV. L. & POL. 1, 16 nn.47-48 (2003).

54. *See, e.g.*, *id.* at 16-24.

55. *See* Neil A. Lewis, *Senator Removes His Block on Federal Court Nominee*, N.Y. TIMES, Dec. 19, 2006, at A21 (reporting on Sen. Sam Brownback's opposition to the nomination of Janet Neff to a federal district court in Michigan).

56. One leading judicial liberal claimed that the Justices' religious beliefs influenced the outcome in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), in which the Court upheld the constitutionality of the federal partial-birth abortion ban. *See* Posting of Geoffrey Stone to the University of Chicago Law School Faculty Blog (Apr. 20, 2007 15:01 CDT), http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html ("Here is a painfully awkward observation: All five justices in the majority in *Gonzales* are Catholic. The four justices who are either Protestant or Jewish all voted in accord with settled precedent.").

57. Amy Goldstein, *Bush Set To Curb ABA's Role in Court Appointments*, WASH. POST, Mar. 18, 2001, at A2 (quoting a letter to the President from Sens. Leahy and Schumer).

professional qualifications and does not consider a nominee's philosophy or ideology."[58] Although Eisgruber concedes that a nominee's professional qualifications matter,[59] he maintains that a nominee's values are the "most important determinant of what kind of justice she will be."[60] Taken seriously, Eisgruber's view would entail a ratings system in which "professional" evaluations ranging from "not qualified" to "well qualified" are supplemented by ideological evaluations ranging from "liberal" to "conservative."

Judicial conservatives will no doubt find these implications for the appointments process troubling. As they have in the past, judicial conservatives will question the propriety of big-picture studies and inquiries into "deeply held views,"[61] arguing that such measures misrepresent the judicial role by focusing on political results rather than legal reasoning.[62] They will reject calls to factor ideology into the ABA's ratings, which they already regard as too politicized.[63] Insisting that the focus should be on methodology, judicial conservatives will resist any reform that presumes the importance of ideology.

To have a chance of succeeding, then, any effort to foster substantive deliberation in the appointments process must reconcile conservative views of the law with liberal ones. The notion of hard cases provides the framework for doing just that. Senators can use the notion of hard cases as a way of asking nominees about both methodology (how would you know a hard case when you saw one?) and ideology (how would you go about deciding a hard case?). Nominees will feel comfortable responding so long as they can make clear their views concerning the *number* of hard cases. Of course, nominees (as well as lawyers and judges generally) often speak as if the law yields a single right

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58. Am. Bar Ass'n, Standing Committee on the Federal Judiciary, http://www.abanet.org/scfedjud (last visited Feb. 24, 2008).

59. EISGRUBER, *supra* note 1, at 130, 135.

60. *Id.* at 154.

61. *See, e.g.*, BORK, *supra* note 7, at 287-88, 291-92 (criticizing big-picture studies); Cornyn, *supra* note 53, at 16-24 (criticizing references to "deeply held personal beliefs").

62. *See, e.g.*, *Confirmation Hearing*, *supra* note 36, at 10 (statement of Sen. Orrin G. Hatch) ("We must use a judicial rather than a political standard to evaluate [a nominee's] fitness for the Supreme Court."); BORK, *supra* note 7, at 285 (suggesting that a "judicial philosophy" should be defined as an "approach to constitutional interpretation," not "a checklist of results . . . to be assessed for political popularity").

63. *See, e.g.*, James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17 J.L. & POL. 1, 2 (2001) ("The conservative grumblings about possible ABA political favoritism recently led the White House to end the ABA's privileged position in screening candidates before nomination . . . ."); Edward Whelan, *Lowering the Bar*, WKLY. STANDARD, June 12, 2006, at 8, 10 ("[I]t's long past time for the ABA to take serious steps to ensure the selection of committee members who will not let political bias infect their evaluations of judicial nominees.").

answer in every case, without specifying exactly what they mean by "the law."[64] To avoid confusion, Senators should phrase their questions judiciously: What legal authorities would you consider when interpreting the Constitution and federal laws? Do you think traditional legal authorities ever run out in cases before the Court? How often do you think they run out? When they do run out, what would you as a Justice do?

No set of questions can overcome a nominee's best efforts at evasion. But even if substantive deliberation remains only an ideal, speaking in the language of hard cases will result in a more dignified, less contentious appointments process—one in which liberals and conservatives alike are understood on their own terms. Judicial liberals will realize that their conservative counterparts are not necessarily being disingenuous when they compare themselves to umpires, for everyone recognizes the existence of at least some cases in which the law is determinate.[65] And judicial conservatives will learn that judicial liberals are not necessarily being lawless when they invoke moral values, for everyone acknowledges the existence of at least some hard cases.[66]

CONCLUSION

The real divide between judicial liberals and judicial conservatives lies in their views of the relative number of hard cases the Supreme Court hears. Judicial liberals perceive very many hard cases and thus attribute their differences with judicial conservatives to ideology; judicial conservatives perceive extremely few hard cases and thus attribute their differences with judicial liberals to methodology. Until the two sides turn the vocabulary of hard cases into a common language in which to understand each other, any attempt to repair the Supreme Court appointments process is doomed to fail.

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64. *See* RONALD DWORKIN, LAW'S EMPIRE 37-43 (1986); *see also supra* note 34.

65. *See, e.g.*, EISGRUBER, *supra* note 1, at 28 (acknowledging that "judging might sometimes feel much like umpiring" in the lower federal courts).

66. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (recognizing a degree of "lawmaking" left to judges in cases of statutory interpretation, the extent of which depends on "the relative specificity or generality of [Congress's] statutory commands"); Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822 (1990) ("[U]ndeniably whether one is examining the Constitution or legislation, with respect to a given case, one often encounters ambiguities.").